

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 48.1 Amendment Instrument 2019 (No. 1)

Purpose

The purpose of *Civil Aviation Order 48.1 Amendment Instrument 2019 (No. 1)* (the **CAO amendment**) is to give CASA the ability to approve limited or minor non-compliance with specified fatigue risk management provisions that would otherwise apply to a person. The persons are holders of air operator certificates (**AOC holders**) and a non-compliance approval would also cover their flight crew members (**FCMs**).

The approval process would be available in relation to an AOC holder engaged in an aerial work operation that is an emergency services operation, and to whom, under transitional provisions, a Civil Aviation Order (**CAO**) that is a repealed predecessor to *Civil Aviation Order 48.1 Instrument 2019* (the **2019 CAO**) still applies.

An **emergency services operation** is defined in subsection 6 of the 2019 CAO as an operation involving an aircraft for the purpose of law enforcement, or saving or protecting life or property [which in practice includes firefighting]; and conducted by, or at the request of, an organisation recognised by an Australian governmental agency as having responsibility to conduct or request the operation as part of the organisation's functions.

The approval process would also be available in relation to an AOC holder (including a Part 141 certificate holder) engaged in any operation and to whom the 2019 CAO itself applies.

These approval processes would be a lawful form of something that has some of the characteristics of an exemption process. There are legal difficulties around using the exemption power in Part 11 of the *Civil Aviation Safety Regulations 1998 (CASR)* for this purpose.

Legislation

The legislative basis for the new CAO is set out in Appendix 1.

Background

It is generally the case that regulatory requirements under the *Civil Aviation Regulations 1988 (CAR)*, CASR and the CAOs may be the subject of exemption under Part 11 of CASR with respect to individuals or classes of persons in appropriate circumstances in which related safety conditions are imposed and complied with.

However, there is some doubt about the propriety of using an exemption power located in regulations to conditionally exempt persons from the requirements of CAOs that are made wholly or partly under the *Civil Aviation Act 1988* itself (the **Act**).

The legal principle is often expressed in terms that “a stream may not rise higher than its source”. To use regulations under an Act to interfere in matters directly provided for by the Act requires the equivalent of what is colloquially known as “a Henry VIII clause”. This is an express provision in an Act empowering regulations made under

the Act to interfere in matters provided for by the Act. Henry VIII clauses are uncommon in modern Commonwealth legislation and there are none in the Act.

Under subsection 98 (5A) of the Act, regulations made under the Act may empower CASA to issue instruments in relation to matters affecting the safe navigation and operation of aircraft. Regulation 11.160 is such a regulation, empowering CASA, by instrument, to grant exemptions from compliance with a provision of a regulation or a CAO. CAOs are generally made under CAR which, under regulation 2C of CAR, is taken to include CASR. While there is clearly a power to exempt from a CAO made under CAR or CASR, it is doubtful whether this exemption power extends to a CAO made directly under the very Act that is parent to the regulations containing the exemption power.

The 2019 CAO provides the regulatory framework for fatigue risk management in aviation. It applies to AOC holders and to their FCMs. It is relevantly made under paragraph 28BA (b) of the Act, which provides that an AOC “has effect subject to ... any conditions specified in the regulations or Civil Aviation Orders”.

It is also made under subsection 98 (4A) of the Act, which provides that “CASA may issue Civil Aviation Orders, not inconsistent with this Act or the regulations ... with respect to any matter in relation to which regulations may be made for the purposes of section ... 28BA”.

AOC conditions are such matters in relation to which regulations may be made for section 28BA of the Act. Therefore, CAOs may be issued for those matters, such CAOs (like the 2019 CAO) are thus made under those provisions of the Act (paragraph 28BA (b) and subsection 98 (4A)), and, in the absence of express reference or necessary implication, a regulation empowered by the Act (like regulation 11.160), may not amend or negate the Act or what the Act provides for.

The CAO amendment is designed to avoid legal uncertainty by creating within the 2019 CAO a limited or minor non-compliance approval mechanism the legal efficacy of which is beyond any legal doubt.

Immediate requirement for the CAO amendment

The need for this flexibility has arisen in the immediate context of the 2019-2020 bushfire season in Australia in relation to the contingencies and emergencies of which it is both desirable, and sometimes essential, to temporarily relax – subject to appropriate safety conditions – the fatigue risk management obligations that would otherwise restrict some responses to emergency bushfire threats to persons, animals and property by AOC holders required to comply with the 2019 CAO or, by virtue of transitional provisions, its predecessors. The same flexibility is required in relation to other emergency services operations which may involve emergency police operations or search and rescue operations.

Prescriptive limits, whether under the 2019 CAO or under its transitionally applicable predecessors, are not able to address every potential scenario. There are occasions when the particular circumstances of an AOC holder may permit operation in excess of the prescriptive limits provided that there are specific mitigations in place to provide an equivalent level of fatigue risk management.

Appendix 7 — Fatigue Risk Management Systems (**FRMS**) of the 2019 CAO (and its 2013 and 2013/2016 predecessors) provides a mechanism, for those operators who chose to use it, to create, subject to CASA approval, a bespoke system to manage their unique fatigue risks. While this option offers flexibility, it involves sophistication and overhead costs.

The independent review of the fatigue rules commissioned by the CASA Board, which reported in 2018, identified the need for a “minor variation” process to permit certain operations to occur outside the prescriptive limits of the relevant CAOs without the full overhead associated with developing and maintaining an FRMS.

This CAO amendment is designed to provide an explicit process to permit minor variations while avoiding the legal doubts associated with using Part 11 exemptions for this purpose. Before issuing any such non-compliance approval, CASA must be satisfied that the approval will preserve an acceptable level of aviation safety.

The CAO amendment

The 2019 CAO takes effect on 1 July 2020 for all AOC holders (1 October 2020 for those using FRMS). However, the 2019 CAO is the current end product of an evolving series of similar CAOs beginning in 2013 (the **2013 CAO**) and amended (not commenced but open for opting into) in 2016 (the **2013/2016 CAO**). Various AOC holders and Part 141 certificate holders either became subject to, or opted in to coverage by, these earlier CAOs. The 2019 CAO uses saving and transitional provisions to grandfather their positions until 1 July 2020 or 1 October 2020 as applicable for FRMS (the **transition date**), so that they may continue to be bound by, and comply with the earlier CAO that applies to them.

Thus, under paragraph 5.3 of the 2019 CAO, the CAO takes effect on the transition date for a person who before 2 September 2019, applied for an AOC or a Part 141 certificate, was granted it after 2 September 2019, and until immediately before the transition date *complies with the requirements of the 2013/2016 CAO, as if that CAO had not been repealed.*

Under paragraph 5.4, the 2019 CAO takes effect on the transition date for a person who was granted a relevant AOC or a Part 141 certificate on or after 30 April 2013 but before 2 September 2019, and until immediately before the transition date *complies with the requirements of the 2013 CAO or (if the person had opted in) the 2013/2016 CAO, as if that CAO had not been repealed.*

Under paragraph 5.5, the 2019 CAO takes effect on the transition date for a person who was an AOC holder immediately before 30 April 2013, or a Part 141 operator, and had not opted in to the 2013 CAO or the 2013/2016 CAO, and until immediately before the transition date *complies with the requirements of an applicable CAO, that is a relevant CAO that preceded the 2013 CAO.*

Finally, under paragraph 5.6, the 2019 CAO takes effect on the transition date for a person who is an AOC holder or a Part 141 operator, and had opted in to the 2013 CAO or the 2013/2016 CAO, and until immediately before the transition date *complies with the requirements of the 2013 CAO or (if the person had opted in) the 2013/2016 CAO, as if that CAO had not been repealed.*

The effect of these provisions was to allow AOC holders and Part 141 certificate holders to continue to comply with the relevant predecessor CAO to the 2019 CAO.

To allow for conditional non-compliance with the relevant CAO in the face of unforeseen contingencies arising for emergency service operations, paragraph 5.10 in Schedule 1 of the CAO amendment provides that a reference in subparagraph 5.3 (c), 5.4 (b), 5.5 (c) or 5.6 (c) to a person complying with the requirements of an applicable CAO, the 2013 CAO or the 2013/2016 CAO (as the case requires) (the **relevant CAO**), means the person must comply with the relevant CAO unless CASA, in writing, approves limited or minor non-compliance by the person with the requirements of a specified provision of the relevant CAO:

- (a) for the purposes of an emergency service operation; and
- (b) subject to compliance with safety conditions expressed in the approval.

A reference to a specified provision includes specified provisions (under paragraph 23 (b) of the *Acts Interpretation Act 1901*, the singular includes the plural, absent a contrary intention). The words “limited or minor” will attract their natural, ordinary and literal meaning. Over time, based on practice, CASA will be in a position to publish guidelines on the scope of the non-compliance approval process.

While this provision allows approved non-compliance with a predecessor CAO that still applies on a transitional basis, it does not allow approved non-compliance from the 2019 CAO itself. Such a facility is equally important to confer some limited flexibility to deal with unforeseen contingencies in the context of both emergency service operations and other operations, when necessity requires some conditional relaxation or variation in the application of relevant provisions.

New subsection 5A therefore addresses such a requirement. Under paragraph 5A.1, CASA may, on application or on its own initiative, by instrument in writing, approve limited or minor non-compliance with the requirements of a specified provision of the 2019 CAO.

Under paragraph 5A.2, an approval has the effect that the specified provision of the 2019 CAO does not apply to the AOC holder to whom the approval applies, provided that any conditions expressed in the approval are complied with. A Note explains that the expression “AOC holder” includes a Part 141 certificate holder by virtue of the definition of **AOC holder** in subsection 6.

Under paragraph 5A.3, an approval has the effect that the specified provision of the 2019 CAO does not apply to the AOC holder’s FCMs.

Under paragraph 5A.4, CASA must not grant an approval unless CASA is satisfied that compliance with the approval, including any conditions of the approval, will preserve an acceptable level of aviation safety.

Under paragraph 5A.5, an instrument of approval is a legislative instrument if the instrument is expressed to apply to a class of AOC holders. Under paragraph 5A.6, an instrument of approval is not a legislative instrument if the instrument is expressed to apply to a particular AOC holder.

Paragraphs 5A.5 and 5A.6 are designed to mirror the standard for exemption instruments provided for under subsections 98 (5AA) and (5AB) of the Act.

As mentioned above, a reference to a specified provision allows approval of specified provisions (plural) if need be.

It is expected that non-compliance approvals will be granted only if appropriate mitigating safety conditions can be formulated and complied with.

Legislation Act 2003 (the LA)

The CAO amendment is a legislative instrument under various different requirements, as set out in Appendix 2.

Incorporation of documents

No documents are applied, adopted or incorporated by virtue of the CAO amendment.

Administrative review

A refusal to approve a non-compliance application would be subject to review by the Administrative Appeals Tribunal (the *AAT*) as follows. Section 31 of the Act defines a reviewable decision to include: (a) a refusal to grant, issue, vary, suspend or cancel a permission issued or granted under the regulations; and (b) the imposition of a condition contained in such a permission.

Table 201.004 in CASR contains a list of decisions that are reviewable by the AAT. Item 1 of Table 201.004 includes “a *decision under a provision of these Regulations ... refusing to grant or issue an authorisation*”. For regulation 201.004, the term “authorisation” has the meaning given by regulation 11.015, which in turn refers to the definition of *civil aviation authorisation* in the Act. That term means “an authorisation [by whatever name] under this Act or the regulations to undertake a particular activity”.

In *Seaview, Lord Howe Pty Ltd and Civil Aviation Authority* (1995) 38 ALD 422; 21 AAR 506, Justice Mathews said, at 23, decisions made pursuant to civil aviation orders should be construed as decisions made under the Act. *Civil Aviation Order 48.1 Instrument 2019* is made under the Act, CAR and CASR. An instrument made under a CAO, refusing to grant an authorisation under the CAO, is also considered to be a reviewable decision for item 1 of Table 201.004 of CASR.

Consultation

The utility of a “minor variation” process was included in (and approved under) the extensive consultation undertaken by CASA in the context of the independent review report and the making of the 2019 CAO. It had been considered at that time that a Part 11 exemption process would suffice to achieve the objective. Doubt about the legal propriety of using such exemptions resulted in the decision to make the CAO amendment as a more focused and tailored alternative.

Under section 16 of the Act, in the performance of its function and the exercise of its powers CASA must, *where appropriate*, consult with government, industrial, consumer and other relevant bodies and organisations. CASA considers that, given the previous consultation mentioned above, and given the exigencies of the 2019-2020 Australian bushfire season, it would not be appropriate to delay making and

commencement of the new non-compliance provisions through further consultation. This decision is also informed by the fact that the provisions, if and when invoked, would operate in a beneficial manner for any successful applicant by (conditionally) relieving the applicant of fatigue risk management obligations that would otherwise apply.

Under subsection 17 (1) of the LA, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation that is considered by the rule-maker to be appropriate and reasonably practicable. For the reasons mentioned above, CASA does not consider it either appropriate or practicable to undertake consultation on the CAO amendment.

Statement of Compatibility with Human Rights

The Statement in Appendix 3 is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. It indicates that the CAO amendment does not engage, either directly and indirectly, any of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Office of Best Practice Regulation (OBPR)

A Regulation Impact Statement (a *RIS*) for the 2013 CAO was prepared by CASA and assessed by OBPR as adequate (OBPR id: 14395). The 2019 CAO modified some aspects of the 2013 CAO, however, these modifications did not affect the underlying basis of, and the essential outcomes from, that RIS. OBPR agreed with an assessment that the 2019 CAO would represent a net reduction in costs to the aviation industry and it considered that a further RIS was not required (OBPR id: 25114).

In addition, a RIS is not required under OBPR's *Guidance Note: Carve Outs* (February 2016) where approvals are considered to be minor or machinery instruments that do not substantially alter existing arrangements, and where they are required by the Act or the regulations in the course of their administration by CASA (OBPR id: 14507). The CAO amendment creates an administrative non-compliance approval mechanism. It is, therefore, of a minor or machinery nature, and made in the course of CASA's administration of aviation safety requirements.

Making and commencement

The CAO has been made by the Director of Aviation Safety, on behalf of CASA, in accordance with subsection 73 (2) of the Act.

The CAO commences on the day it is registered on the Federal Register of Legislation.

Legislation — legislative basis for CAO 48.1

Under section 27 of the Act, CASA may issue Air Operators' Certificates (*AOCs*) with respect to aircraft for the purpose of safety regulation. Under section 28 of the Act, CASA must issue the AOC if satisfied that the applicant can comply with the requirements of Australian civil aviation safety legislation.

Under paragraph 28BA (1) (b) of the Act, an AOC has effect subject to any conditions specified in the regulations or CAOs.

Additionally, under subsection 98 (4A) of the Act, CASA may issue CAOs, not inconsistent with the Act, in respect to any matter in relation to which regulations may be made for the purposes of, relevantly, section 28BA of the Act (conditions of AOCs).

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend or vary any such instrument.

Why the CAO is a legislative instrument

Paragraph 28BA (1) (b) of the Act provides that an AOC has effect subject to any conditions “specified in the [regulations or] Civil Aviation Orders”.

By so providing, paragraph 28BA (1) (b) of the Act is considered to be a separate head of power for the making of relevant CAOs.

The CAO amendment amends the 2019 CAO which imposed conditions on AOCs to which it applied.

For subsection 8 (4) of the LA (the definition of a *legislative instrument*), such a CAO, and any amendment of it, has a legislative character (it determines and alters the law and imposes obligations) and is, therefore, a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

Paragraph 28BA (1) (b) of the Act provides that an AOC has effect subject to any conditions “specified in the regulations [or Civil Aviation Orders]”.

Subsection 98 (4A) of the Act provides that CASA may issue CAOs with respect to any matter in relation to which regulations may be made for the purposes of section 28BA.

The 2019 CAO imposed conditions on AOCs to which it applies. Under subsection 98 (4B) of the Act, a CAO (or CAO amendment) issued under subsection 98 (4A) is stated to be a legislative instrument and is, therefore, subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

The CAO amendment is made under these various heads of power and is a legislative instrument.

Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the
Human Rights (Parliamentary Scrutiny) Act 2011*

Civil Aviation Order 48.1 Amendment Instrument 2019 (No. 1)

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The purpose of *Civil Aviation Order 48.1 Amendment Instrument 2019 (No. 1)* (the **CAO amendment**) is to give CASA the ability to approve limited or minor non-compliance with specified fatigue risk management provisions that would otherwise apply to a person. The persons are holders of air operator certificates (**AOC holders**) and a non-compliance approval would also cover their flight crew members.

The approval process would be available in relation to an AOC holder engaged in an aerial work operation that is an emergency services operation, and to whom, under transitional provisions, a Civil Aviation Order (**CAO**) that is a repealed predecessor to *Civil Aviation Order 48.1 Instrument 2019* (the **2019 CAO**) still applies.

The approval process would also be available in relation to an AOC holder (including a Part 141 certificate holder) engaged in any operation and to whom the 2019 CAO itself applies.

These approval processes would be a lawful form of something that has some of the characteristics of an exemption process. There are legal difficulties around using the exemption power in Part 11 of the *Civil Aviation Safety Regulations 1998* for this purpose.

Human rights implications

The instrument does not engage any human rights protections. It provides a beneficial non-compliance approval power to address unforeseen contingencies in the application of the 2019 CAO.

Conclusion

Therefore, the CAO amendment does not either directly and indirectly engage any of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Civil Aviation Safety Authority